

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Affidavit Under Fish and Game Code Section 2357

January 2000

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **March 15, 2000.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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AFFIDAVIT UNDER FISH AND GAME CODE SECTION 2357

1 Fish and Game Code Section 2357 makes it unlawful to carry trout into an area
2 where the season is closed, unless a notarized affidavit was previously made in
3 duplicate in the area where the trout were taken and the duplicate was left on file
4 with the notary.¹ Presumably, the provision is intended to facilitate determination
5 of whether the trout were lawfully taken.²

6 The operation of this statute is problematic,³ and the Law Revision Commission
7 has been directed to review it.⁴ The Commission recommends its repeal.

8 The statute is obscure, even within the sport fishing community. It appears to be
9 unpublicized and unenforced.⁵ The statutory requirements are also burdensome
10 and inconsistent with common expectations.

11 Fishing is a highly regulated activity⁶ and other restrictions on transporting fish
12 may be appropriate,⁷ but Section 2357 appears to achieve no purpose. It

1. The statute provides:

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.

Unless otherwise indicated, all further statutory references are to the Fish and Game Code.

2. An angler who possesses trout where the season is closed may be accused of taking the trout out of season. In defense, the angler may contend that the trout were taken where the season was open. If the angler raises this defense, the angler must either produce evidence of the affidavit required by Section 2357, or risk prosecution pursuant to that statute.

3. It is questionable whether a notary public is a proper repository of an affidavit. See Gov't Code § 8205 (duties of notary public). Moreover, the requirement that a duplicate of the affidavit be left on file with the notary public appears unnecessary, because an angler's possession of the original should be sufficient proof of the angler's proper activity.

4. Gov't Code § 70219; see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 86 (1998).

5. The requirement is not mentioned in *1999 California Sport Fishing Regulations*, a booklet that the Department of Fish and Game distributes to anglers to inform them of applicable restrictions. When contacted by a researcher from the Institute for Legislative Practice, Fish and Game personnel were surprised to learn of the statute's existence. See Yang & Kelso, *Transportation of Trout Into Closed Areas* (Inst. Leg. Prac. 1998). Legal research disclosed no reported cases construing the statute.

6. See, e.g., 14 Cal. Code Regs. § 1.74 (salmon punch card and steelhead trout catch report-restoration card); 14 Cal. Code Regs. § 7.00 (bag and possession limits, fishing seasons); 14 Cal. Code Regs. § 7.50 (1999) (alphabetical list of waters subject to special restrictions on fishing methods and gear, use of bait, fishing seasons, size limits, bag and possession limits, fishing hours); 14 Cal. Code Regs. § 8.00 (1999) (supplemental restrictions on taking and possessing trout and salmon).

7. See, e.g., Sections 2356 (removal of trout from state), 2358 (shipping trout into area where season is closed); 14 Cal. Code Regs. § 135 (1999) (importation of fish commercially taken out-of-state); *Johnson v. Gentry*, 220 Cal. 231, 30 P.2d 400 (1934) (upholding statute prohibiting transportation of salmon through specified ocean districts of State in closed season); *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 F.2d 111 (S.D. Cal. 1929) (Supreme Court has repeatedly recognized power of state to prohibit shipment of game lawfully taken within its borders to points without state, and to prohibit

13 criminalizes a failure to act (failure to obtain a notarized affidavit) under
14 circumstances where even a conscientious trout angler is unlikely to be aware of
15 the statutory requirement.⁸ It is not a necessary or a reasonable means of enforcing
16 the trout season.⁹ The statute may be repealed without adverse effect.

possession of game within state, when shipped from points without state).; *Adams v. Shannon*, 7 Cal. App. 3d 427, 86 Cal. Rptr. 641 (1970) (upholding prohibition on importation and possession of piranha); *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. 2d 56, 63, 130 P.2d 256 (1942) (state is owner of its fisheries for benefit of its citizens and can impose any condition on taking and use, after taking, of fish within its waters, reasonably necessary for conservation of its fisheries and beneficial use of its citizens).

⁸. A statute that criminalizes a failure to act in circumstances where a reasonable person would not think there was an obligation to act is inconsistent with established principles of fairness and due process. *Lambert v. California*, 355 U.S. 225, 227-29 (1958) (where person did not know of duty to register and there was no proof of probability of such knowledge, person may not be convicted consistently with due process); but see *State v. Huebner*, 252 Mont. 184, 827 P.2d 1260, 1263 (1992) (hunters are responsible for knowing laws pertaining to their sport). The Institute for Legislative Practice has reviewed Section 2357 and concluded that it is constitutionally suspect. See *Transportation of Trout Into Closed Areas*, *supra* note 5.

⁹. The lack of necessity is evident from the lack of a similar affidavit requirement, and existence of a contrary provision, for black bass and spotted bass. See Section 2360 (black bass and spotted bass lawfully taken may be carried into area where season is closed). The apparent lack of enforcement (*supra* note 5) is further evidence that Section 2357 is unnecessary.

Although the affidavit required by Section 2357 would be relevant in a prosecution for taking trout out of season, other means of proof exist. Possession of trout where the season is closed is strong circumstantial evidence that the possessor took the trout out of season. See Section 2000 (possession of fish is *prima facie* evidence that possessor took fish); compare H. Thoreau, 8 Writings 94 (1906), *quoted in* Oxford Dictionary of Quotations, p. 696 (Oxford Univ. Press, 4th ed. 1992) (“Some circumstantial evidence is very strong, as when you find a trout in the milk.”). The prosecution may also introduce other evidence (e.g., evidence that the trout was recently caught and the defendant had not recently been in an area where the season was open), as may the defense (e.g., witnesses who recently saw the defendant catch or possess trout in an area where the season was open).

PROPOSED LEGISLATION

1 **Fish & Game Code § 2357 (repealed). Trout affidavit**

2 SECTION 1. Section 2357 of the Fish and Game Code is repealed.

3 ~~2357. It is unlawful to carry trout into an area where the season is closed unless~~
4 ~~an affidavit is made in duplicate before a notary public in the area in which the~~
5 ~~trout are or might be lawfully taken. Such affidavit shall state the date and place of~~
6 ~~taking such trout, and the name, address, and number of the angling license of the~~
7 ~~person legally taking such trout. The duplicate of the affidavit shall be left on file~~
8 ~~with the notary public before whom the affidavit is made.~~

9 **Comment.** Section 2357 is repealed, because it is unduly burdensome and contrary to common
10 expectations. See *Affidavit Under Fish and Game Code Section 2357*, 30 Cal. L. Revision
11 Comm'n Reports __ (2000).
